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No. 97-16

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

OHIO FORESTRY ASSOCIATION, INC.,

Petitioner,

v.

SIERRA CLUB, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

1. The Sixth Circuit here reached out, in a non-justiciable case, to mount a political and policy-based broadside against a federal agency. The court below found that the statutes under which the Forest Service operates pervasively bias the agency, causing it to reach results that appeared unwisely (to the court below) to favor timber interests. As shown in the Petition (at 14-17), this concept of "bias" has no legal support and denies to co-equal branches of government and their decisionmaking the basic respect the judiciary owes them.

To provide a foundation for its broadside, the Sixth Circuit adopted a standard of justiciability that directly conflicts with decisions of two other circuits. This expansive view of standing and ripeness provides a precedential basis for further facial attacks on the agency's 10-15 year forest plans.

On the merits, the Sixth Circuit not only invalidated the Wayne Forest Plan, but the court prescribed binding rules of law for all National Forests within the Sixth Circuit. It limited timber harvesting that produces an even-aged stand of trees to "exceptional circumstances" and granted recreational uses a preference over timber uses. The agency's acquiescence in these erroneous standards within the Sixth Circuit would mean that its future decisions under those standards could not be challenged effectively by affected forest products companies.

Thus, unless this Court intervenes, the Sixth Circuit's value-laden policy pronouncements on the proper uses of National Forests will have worked a permanent and unreviewable change to the National Forest Management Act, to the direct detriment of Petitioner's members, other forest products companies, and timber-dependent communities. While the United States might sometimes be commended for "turning the other cheek" and acquiescing in an erroneous decision, this is not such a case. The pervasive mischief of this decision will continue to affect Petitioner's members, and

the clear conflict in the circuits on both the merits and justiciability issues will be perpetuated. The Sixth Circuit's decision not only expands federal court jurisdiction beyond constitutional bounds, but also illustrates why the Framers limited the jurisdiction of the federal courts to the resolution of concrete cases, not broad debates over general policy.

2. Federal Respondents concur almost completely with Petitioner about the significance of the justiciability and merits issues presented, the conflict in the circuits on both issues, and the fundamental legal errors in the Sixth Circuit's rulings on both issues. Federal Respondents nonetheless labor to justify their opposition to the Petition. That opposition takes the form of soothsaying about what might happen in the future to render the pernicious precedents created by this case less important than they appear to be. The opposition to certiorari rests on gossamer-thin and ultimately erroneous speculation.

3. Federal Respondents (at 13) agree that the Article III issue (the justiciability of a facial challenge to a forest plan by plaintiffs claiming environmental injury from timber harvesting) "is the subject of a conflict in the circuits." The court below engaged in "premature and needlessly abstract" review and lacked jurisdiction under decisions like *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990). Fed. Opp. 15-16; *see id.* at 3-8, 13-18; Pet. 8-13. The procedural rationales Federal Respondents offer for declining review are insubstantial.

a. Federal Respondents argue (at 19-20) that the Sixth Circuit's decision on justiciability should not be reviewed because the court had before it only the pleadings. But that is precisely the point. Those pleadings did not demonstrate any Article III controversy, though it is the "responsibility of the complainant" to affirmatively allege facts in the "pleadings" to overcome the "presum[ption] that federal courts lack jurisdiction." *Renne v. Geary*, 501 U.S. 312, 316 (1991).

Nor is the *legal* defect in the Sierra Club's theory for Article III jurisdiction curable by a *factual* affidavit.[1]

b. The Forest Service argues (at 22-23) that the Court need not resolve the conflict over the jurisdictional issue because, in the future, the agency *might consider* amending its regulations to alter the nature of its forest planning in a way that would create standing to facially challenge future plans. This non-committal statement should not delay this Court's review. The jurisdiction that Federal Respondents agree is lacking, coupled with the mature 3-to-2 circuit split and recurring injuries to Petitioner's members, warrant current review by this Court.[2]

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[1] On August 26, 1997, the Sierra Club filed in district court three standing affidavits that explain the factual basis for its claim that it suffers an Article III injury from the existence of a general planning document, the Wayne Forest Plan. *See* Sierra Club Opp. at 10-11; Mem. In Supp. Of Pls. Renewed Motion For Summ. J. And Inj. Relief (copy lodged with the Clerk of this Court). Those affidavits restate the pleaded theory of standing. The record now contains all the materials the Court might desire to resolve the jurisdictional issue.

[2] "The judiciary must not close the door to the resolution of the important questions" even if they would be arguably mooted in the future. *Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 127 (1974). Petitioner's members are suffering current injury as the Forest Service and district court, citing the Sixth Circuit's decision, have halted *uneven-aged* timber sales and timber sales generally. Continuing injuries to our interest in timber production will occur as long as the decision below remains in effect. District courts are already relying on the Sixth Circuit's distrust of the Forest Service and of even-aged management in enjoining timber harvesting. *See House v. United States Forest Serv.*, No. 96-446 (E.D.Ky. decided May 29, 1997); *Sierra Club v. Glickman*, No. 9:85-CV-69 (E.D. Tex. decided Aug. 14, 1997). A Complaint to enjoin the Daniel Boone Forest Plan and all timber harvesting on the basis of the Sixth Circuit's rulings on bias, even-aged

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Further, it is *highly unlikely* that the Forest Service would change the planning regulations or a forest plan in a jurisdictionally-relevant way at this late date.[3] A general forest plan would cause an Article III environmental injury only if the forest plan process were transformed into an exercise of Soviet-style central planning that commits to specific ground-disturbing projects and specific output levels for a decade or more. No such regulatory change can be reasonably expected, as the 1991 and 1995 rulemaking proposals emphatically demonstrate. *See* note 3. Forest plans will continue to be general planning documents.

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[2](...continued)
management, and preference for recreation has been filed as *Kentucky Heartwood, Inc. v. Worthington*, No. 97-378 (E.D. Ky. Sept. 5, 1997). These cases compromise the National Forest System purpose of furnishing a continuous supply of timber. *See* 16 U.S.C. 475; *United States v. New Mexico*, 438 U.S. 696, 707, 714-15 (1978).

[3] The Department of Justice and the Forest Service have a longstanding interpretation that a forest plan is a programmatic statement of intent that does not dictate alterations of the on-the-ground environment. *See* Fed. Opp. 2-4, 7-8. The Administration's 1991 and 1995 proposals to amend the planning regulations, 36 C.F.R. Part 219, retained and *vigorously promoted* the concept that a forest plan does *not* dictate on-the-ground changes and environmental injury. *See* 60 Fed. Reg. 18886, 18897, 18923 (April 13, 1995); 56 Fed. Reg. 6508, 6513, 6516, 6518-19, 6530-31 (Feb. 15, 1991). Any *future* proposal is likely to continue this concept. And, regulatory change moves glacially. The agency's 1991-95 initiatives were withdrawn without a final rulemaking. GEN. ACCOUNTING OFFICE REP. B-277622, BUREAU OF LAND MANAGEMENT AND FOREST SERVICE: INFORMATION ON THE TIME SPENT ON MAJOR AND SIGNIFICANT RULES 17-18 (Aug. 20, 1997).

Hence, the jurisdictional issue presented by facial challenges to a general planning document will not go away.[4] Resolving the recurring jurisdictional issue now would be especially timely, to provide guidance before litigation begins on the imminent next generation of forest plans. *See* Pet. 13.

4. Federal Respondents agree (at 24-25) that if the court below ruled that forests cannot be primarily managed in even-aged stands, the "ruling is squarely in conflict with the Fifth Circuit's decision in *Sierra Club v. Espy* [38 F.3d 792, 799-800 (5th Cir. 1994)] and has no basis in the NFMA." Any general rule against even-aged management has a "very substantial impact upon the Forest Service's management of public lands," Fed. Opp. 25, and a very substantial impact on forest products companies and timber-dependent communities. *See* Pet. 18-21.

Federal Respondents offer (at 25-26) a remarkable interpretation of the Sixth Circuit's decision under which the statement that the NFMA allows even-aged management only in exceptional circumstances is somehow read merely to restate the requirements in 16 U.S.C. 1604(g)(3)(F). On this basis, the broad rationale of the actual Sixth Circuit decision on both the applicable standard (and the agency's inherent bias) is reduced to an innocuous and uncertworthy finding that the Forest Service failed to provide documentary support of compliance with the statutory standard.

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[4] This also answers Federal Respondents' suggestion that review be delayed because the agency may amend the forest plan to include the facts on implementation. Such a plan amendment would not alter the jurisdictional issue of whether a facial challenge to a forest plan (or an amended forest plan) is justiciable. The implementation facts, summarized at Fed. Opp. 16-17, simply confirm why litigation over a forest plan's *projections* is premature.

The answer is simply that this is not the Sixth Circuit's holding or its rationale, as Federal Respondents recognized when they sought rehearing below. *See* Fed. Opp. 26 n.17. Since § 1604(g)(3)(F) does not use the phrase "exceptional circumstances" or suggest that meaning, the court below was not restating the NFMA language, but adding an overriding gloss not contained in the statute itself. The opinion lacks any suggestion that the Wayne Forest Plan did not provide documentary support for its proposed level of even-aged logging. Instead, the court below concluded that, since the Forest Plan projected that "eighty percent of all timbering techniques would be 'even-aged,'" the Plan was unlawful as even-aged management cannot be the "statutory rule, rather than the exception." Pet. App. 4a, 6a. The court below *did indeed* conclude that even-aged management cannot be the "predominant method of timber harvesting" – a conclusion that "might well warrant review by the Court." Fed. Opp. 25. A "squarer conflict on a fundamental issue of forest management is harder to fathom." R. Lazarus, *Forestry Advance, Wetlands Retreat*, THE ENVTL. FORUM, March/April 1997, at 10.

5. Federal Respondents offer other strained objections to this Court's review of the justiciability and merits issues.

a. Federal Respondents suggest that the Wayne Forest Plan is out of date and not worth fighting for. But that misses the issue. The Sixth Circuit's disapproval of even-aged management and its preference for primitive recreation are not tied to this Plan. Rather, they establish legal limits that could well constrain *all* future forest plans within the Sixth Circuit.

By accepting review, the Court can assist those preparing the new forest plans and possibly revising the regulations. Only this Court's decision could provide definitive guidance on the constitutional and statutory sideboards within which regulatory discretion may be exercised and remove the existing

legal uncertainty on the reviewability of forest plans, the legality of even-aged management, and any legal preference for recreation.

b. This leaves Federal Respondents' argument (at 18-19) that, because the court of appeals reversed on jurisdictional and merits grounds, and remanded on remedy issues, the Court should not review an "interlocutory" order. The prospect that district court proceedings will follow an appellate decision may influence this Court's decision whether to grant certiorari where the outcome of the district court's decision on remand will affect the issue on which review is sought. This will not occur here.

The Sixth Circuit has issued a final decision on the jurisdictional and NFMA merits issues, and this Court would not benefit from further lower court proceedings on distinct *remedy* issues. This Court frequently reviews interlocutory orders to resolve the type of jurisdictional issues and important circuit conflicts presented here. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n.3 (1949); ROBERT L. STERN ET AL. SUPREME COURT PRACTICE § 4.18, pp. 196-97 (7th ed. 1993). Appellate decisions that reverse and remand are not immune from this Court's scrutiny. *Id.* A ruling on whether jurisdiction exists and whether there has been any violation of law in connection with the current plan should logically precede further debates in lower courts on the remedy and the nature of any revised forest plan.[5]

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[5] The government's proposed narrow reading of the Sixth Circuit's opinion is fanciful on its face. Not surprisingly, the Federal Respondents' speculation (at 18-19, 21-22) that this case could be resolved by a narrow remedy or a non-significant amendment (36 C.F.R. 219.10(f)) to the Wayne Forest Plan has proven to be incorrect. On remand, the Sierra Club moved to enjoin two *uneven-aged* timber

(continued...)

6. The Sierra Club goes further afield in searching for ways to avoid the Court's scrutiny of the opinion below.

a. The Sierra Club argues (at 13-14) that this case does not present a circuit conflict on the justiciability of a facial challenge to a forest plan because timber sales have occurred. Yet, timber sales had also occurred in the two circuit court cases finding facial challenges to forest plans are not justiciable. *Sierra Club v. Robertson*, 28 F.3d 753, 756-57 (8th Cir. 1994); *Wilderness Soc'y v. Alcock*, 83 F.3d 386 (11th Cir. 1996) (timber sales briefed by plaintiffs, but not thought worthy of mention by the appellate court). By its abstract nature, a facial challenge at the "level of generality" of a forest plan is not ripe, where the plan itself causes no present injury. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 894 (1990);

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[5](...continued)
sales and "enjoin[] defendants from implementing the current Forest Plan" until "a fair and unbiased planning process has developed a new set of alternatives to submit for public scrutiny and comment." Mem. In Supp. Of Pls. Renewed Mot. For Summ. J. & Inj. Relief at 2-3 (Aug. 26, 1997). On Sept. 5, District Court Judge Graham granted a temporary restraining order, finding that the Sixth Circuit had indeed found the entire Forest Plan "unlawful" because it "arbitrarily favored timbering over recreational" uses. Reply App. 1a-2a. The hearing transcript (at 16-17) amplifies Judge Graham's plain meaning reading of the broad Sixth Circuit precedents: the conclusions on structural "biases" affecting the Forest Service and its undervaluing of "the recreational value of wilderness" signify that the "decision of the Sixth Circuit completely undermines the entire forest plan" and "that the court of appeals has held that the forest service is incapable of conducting an unbiased and neutral evaluation of the various considerations necessary to prepare a forest plan." (Copies of the Sierra Club Mem. and transcript have been lodged with the Clerk of this Court.) As the foregoing illustrates, if the Court by-passes review, this would not bring the case "to a close as expeditiously as possible." Fed. Opp. 22. The transcript (at 18) also suggests that Judge Graham and the Sierra Club would defer district court proceedings if this Court grants the writ.

see Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 385-86, 395-97 (1926). Even if the Sierra Club had filed an "as-applied" challenge to a particular timber sale (which it did not), it could only obtain review of the portions of the forest plan that were applied in the concrete factual setting of that timber sale. *See* 28 F.3d at 759.

b. The Sierra Club (at 2-7, 15-21, 25-27) prematurely argues why it should win if review is granted, but provides no argument against granting the writ.

c. The Sierra Club (at 27-30) offers no coherent argument against review of the even-aged harvesting issue. The Sierra Club's views are that "Congress disfavors clearcutting" and that the "court below did express the view that the Forest Service had also violated the NFMA by the excessive use of clearcutting" on "80%" of harvested lands. Under these views, the court below did find that even-aged management cannot be the primary "rule" for forest management, and a circuit conflict exists on a significant issue for managing public lands. *See* pages 5-6, above.

The Sierra Club seems to argue the even-aged holding of the Court below was a minor one, and the more important holding was that primitive recreation must be preferred over timber production. We agree that the latter holding also has great significance for National Forest management (and it underlies the TRO against Wayne timber harvesting). Pet. 21-23. Neither set of Respondents has argued that this holding is not certworthy.

d. Though the Sierra Club asserts (at 20-21) that *Bennett v. Spear*, 117 S. Ct. 1154 (1997), affects its standing, there is a fundamental difference between the immediate change in the legal ability to take an endangered species found determinative in *Bennett* and the contingent possibility of injury at issue here. Pet. 20. When a plaintiff challenges

only a forest plan, no environmental injury would occur unless a future ground-disturbing action is taken after another decisionmaking process that is subject to judicial review. Pet. 4, 11.

Far more apt is *Raines v. Byrd*, 117 S. Ct. 2313 (1997), decided after the Petition had gone to the printers. The Court held in *Raines* that Article III jurisdiction was lacking on a facial challenge to the constitutionality of the Line Item Veto Act. The parallels to the facial challenge here are striking. In *Raines*, the Court held that a facial challenge to the Act could not be litigated "at this time and in this form" because there was no imminent personal injury-in-fact. 117 S. Ct. at 2315-16, 2320-22. Thus, the facial challenge form of Sierra Club's 1992 suit is suspect. Further, *Raines* reinforces that an "institutional injury" (there, the "diminution of legislative power") usually is "too abstract" to be "legally and judicially cognizable." *Id.* at 2317-18, 2320-22. The institutional or psychic injuries the Sierra Club asserts here (the forest plan causes injury by merely designating lands on paper as suitable for timber production without proposing or dictating a timber sale) are too abstract to satisfy Article III. *See* Sierra Club Opp. at 11, 17; Fed. Opp. at 3-6.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: Sept. 15, 1997

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Appendix

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

THE SIERRA CLUB, *et al.*, :

[Filed Sept. 5, 1997]

Plaintiffs, :

vs. : Civil Action No. C2-92-249

MIKE DOMBECK *et al.*, : JUDGE GRAHAM

Defendants. :

ORDER PROHIBITING TIMBERING OR BURNS IN THE BLUEGRASS RIDGE RESTORATION AND MARKIN FORK TIMBER PROJECTS

This matter came before the Court on the Motion of the plaintiffs for an order prohibiting the defendants from resuming or permitting the resumption of the activities associated with the Bluegrass Ridge Restoration and Markin Fork Timber Projects. Counsel for the parties appeared before the Court for an on-the-record hearing on the plaintiffs' request for a temporary restraining order. Counsel for intervenors appeared in person and counsel for the government-defendants appeared telephonically.

The Court, having reviewed the application of the plaintiffs with attached affidavits, along with the January 21, 1997 Opinion of the Sixth Circuit Court of Appeals in this matter, finds that the requested relief should be granted.

The Court finds that the plaintiffs will suffer irreparable injuries if these timber projects proceed as they will result in

the removal of trees in portions of the Forest by timbering or burning. Affidavits submitted by the plaintiffs demonstrate that these areas are used by members and officers of the plaintiff organizations. Once cutting is commenced, there would be no way to undo the effects of the timbering. The Court further finds, based upon the decision of the Court of Appeals in this matter, that there is a great probability that the plaintiffs will succeed in demonstrating that the timber projects which are the subject of this Motion are the product of an unlawful Forest Plan which arbitrarily favored timbering over recreational and other uses of the Forest. The Court further finds that there will be little or no injury to the defendants in this case as a result of the issuance of an order prohibiting any further implementation of these projects, especially in light of the fact that the Forest Service had previously, on its own initiative, stayed one of these projects following the issuance of the decision of the Court of Appeals in this matter.

For the above reasons, the defendants and their agents and all those acting in concert with them are hereby enjoined from taking any action to implement the Bluegrass Ridge Restoration Project and the Markin Fork Timber Project until further order of this Court. The defendants, their agents, and those acting in concert with them shall refrain from engaging in any timbering, thinning, and/or burning of trees in the respective project areas until further order of this Court.

This Order shall take effect upon the filing of the plaintiffs of a $1,000.00 bond.

IT IS SO ORDERED:

/s/ James L. Graham
JUDGE JAMES L. GRAHAM